IN THE

Supreme Court of the United States

October Term, 1945

INDIANAPOLIS GLOVE COMPANY,
a Corporation,
Petitioner,
v.
CHESTER BOWLES, *Administrator,*
Office of Price Administration,
Respondent.

No. ———

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The District Court neither gave nor filed a written opinion, but found the facts specially (R. 137-182) and stated thereon its conclusion of law in petitioner's favor. (R. 182.)

The opinion of the Circuit Court of Appeals for the Seventh Circuit, filed August 3, 1945, appears at pages 194 to 202 of the record and is reported in 150 Fed. 2nd 597. No opinion was filed denying petitioner's petition for rehearing. (R. 223.)

II.

JURISDICTION.

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction is set out in the foregoing petition at page 3.

III.

STATEMENT OF THE CASE.

A full statement of the facts having been made in the foregoing petition (pp. 3 to 10), for brevity is not here repeated.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred in the following particulars in holding that:

1. The decision of this Court in *Bowles, Adm. v. Seminole Rock and Sand Co.,* [4] decided on different facts and a different regulation of O.P.A., conclusively established the rule of law against petitioner's contentions as to what were its maximum prices for work gloves;

2. The good faith provision of Section 205(d) of the Act [5] was unavailable to petitioner as a defense when such good faith was stipulated [6] and the trial court found on uncontradicted evidence that petitioner acted in good faith and that its sales and deliveries were made "in pursuance

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(4) Decided June 4, 1945, 89 L. Ed. Adv. Op. 1186.
(5) Emergency Price Control Act of 1942, as amended (50 USCA 925 (d).
(6) Stip. XIV, R. 147.

of applicable regulations of the Office of Price Administration." [7]

3. A letter from the Indianapolis office of respondent, written with the approval of the Cleveland Regional Office, and petitioner believes the Washington office, advising petitioner to proceed with its deliveries at March 21, 1942, prices, did not estop respondent from claiming a penalty for at least the period of time the letter was outstanding.

4. Petitioner was not denied due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States, in not being afforded an adequate opportunity to protest the regulation and respondent's construction, and even though respondent commenced this suit prior to the expiration of the statutory time for filing a protest after respondent's present construction of the regulation became known.

V.

ARGUMENT

A.

Complete jurisdiction in the Supreme Court of the United States is shown by the record.

This was a civil case in the United States Circuit Court of Appeals for the Seventh Circuit, and the petitioner was the only party defendant. (R. 2, 183, 193) (28 USCA 347(a), Judicial Code Sec. 240(a), C. 426, 48 Stat. 926.)

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[7] Finding No. 12, R. 181; R. 99.

B.

1.

The Circuit Court of Appeals erred in at least four particulars.

The Circuit Court of Appeals held that the decision of this Court in *Bowles v. Seminole Rock and Sand Co.* (89 L. Ed. Adv. Op. 1186) conclusively established the rule of law against petitioner's contentions as to its maximum prices. Such distention of the rule was an incorrect application of the decision. The consideration of this Court in that case was "directed to the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188" (89 L. Ed. Adv. Op. 1187). The instant case concerns itself with General Maximum Price Regulation, as amended, and Amendments 23 and 38, none of which was involved in the Seminole case.

The language of the two regulations differs in an important particular. Regulation 188 provides in part that

> " 'Highest price charged during March, 1942' means
> "(i) The highest price which the seller charged to a purchaser of the same class for delivery of *the article* or *material* during March, 1942; . . ." (Emphasis supplied) 7 Fed. Reg. 7968, 7969.

General Maximum Price Regulation, as amended, provides in part that

> "Highest price charged during March, 1942, shall be:
> "(a) The highest price which the seller charged for a *commodity* delivered or service supplied by him during March, 1942, to a purchaser of the same class . . ." (Emphasis supplied) (Stip. V, R. 143, 144).

The word "article" is more limited in meaning than is the word "commodity." As this Court said, "In common usage, 'article' is applied to almost every *separate* substance or material, whether *as a member* of a class, or as a *particular* substance or commodity." [8] (Emphasis supplied.)

The trial court found in the instant case that all of petitioner's gloves "are essentially the same commodity." (Finding No. 14, R. 181.) Thus, petitioner having sold many of its models of gloves at March 21, 1942, prices (Stip. Ex. F, R. 171; offered R. 24), it follows that under the wording of the applicable regulation, as amended, the prices of all of its models, they being the same commodity, could be fixed pursuant to the regulation by adding to or subtracting from the prices at which those models sold in March, 1942, the well-established differentials recognized to exist by O.P.A. (R. 87.) No such latitude was permissible under the wording of Regulation 188, and the question was not raised or passed on in the Seminole case.

General Maximum Price Regulation, as amended, carried a proviso clause (Sec. 1499.2) [9] which in substance provides that if the seller raised his prices prior to April 1, 1942, [10] for delivery of a commodity to his class of purchasers generally and if, during March, 1942, he delivered such commodity [11] at the higher price to at least one class

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[8] June vs. Hedden, 146 U. S. 233, 36 L. Ed. 953, 956.

[9] The full text of Section 1499.2, General Maximum Price Regulation, as amended, appears at pages 143 and 144 of the record. The proviso clause appears at page 144.

[10] Petitioner issued a new price list to its customers effective as of March 21, 1942. (Stip. XX, R. 149.)

[11] During March, 1942, petitioner delivered 58 different models of its work gloves at its March 21, 1942, prices.

of purchasers, [12] then the highest price charged during March, 1942, for each class of purchasers is fixed as follows:

(a) to those to whom no delivery was made during March at the higher price;

(b) to those to whom no delivery was made at a lower price except pursuant to prior commitment,

the highest price charged is the seller's highest offering price for delivery to such class of purchaser during March, 1942.

Regulation 188 provides in Sec. 1499.151 that

> "The provisions of Section 1499.1 to 1499.3, inclusive, and Section 1499.18 of General Maximum Price Regulation shall not apply to sales or deliveries by manufacturers of certain consumers goods set forth in Section 1499.166, Appendix A, of this Maximum Price Regulation 188."

Section 1499.2 of General Maximum Price Regulation carries the proviso clause, thus the proviso clause was inapplicable under Regulation 188.

Amendments 23 and 38 became effective on August 26, 1942, and December 10, 1942, respectively. Each amended Section 1499.2 of General Maximum Price Regulation which contained the proviso clause respecting the seller's highest price charged during March, 1942, if before April 1, 1942, the seller raised his prices for a commodity (Stip. III, R. 138; Stip. V, R. 143).

The proviso clause shows that where a seller had in-

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(12) Petitioner has one price to all its purchasers for all orders for the same item, with the exception of incidental sales in broken lots. (Stip. XXVI, R. 150.)

creased his prices before April 1, 1942, as petitioner did (Stip. XX, R. 149), and where the seller made deliveries, at lower prices than those fixed before April 1, 1942, only pursuant to prior commitment entered into before the price rise, as petitioner did (Stip. XXIII, R. 150; Stip. XXI, R. 149), then the seller's highest price charged during March, 1942, is the seller's highest offering price for delivery or supply during March, 1942. Thus petitioner's highest prices charged during March, 1942, were those prices appearing on the basic price list of March 21, 1942.

The proviso clause was inapplicable to Regulation 188 which was the only regulation before the court in the Seminole case. Furthermore there were no deliveries of the article by Seminole during March, 1942, at the higher price.

In view of the fact, as found by the trial court (Finding 14, R. 181), that each item, number and style of petitioner's gloves is not a separate commodity, but are essentially the same commodity, the delivery of at least 58 models in March, 1942, at March 21, 1942, prices, fixed the highest price charged for those gloves at the March 21, 1942, prices. And by applying the well-established differentials in price based on weight, style and size (a practice of the industry for more than 25 years) to the prices charged for essentially the same commodity, which was delivered in March, 1942, all of petitioner's prices were thus fixed. No such situation existed in the Seminole case.

The application of the well-established price differentials is clearly permitted under the provisions of the Act, and the Administrator is conclusively precluded in the exercise of the powers granted under the Act from compelling any change in business practices, except upon an affirmative

finding requiring such change. Section 2(h) of the Act (50 USCA App. 902(h)) provides that:

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

This record does not disclose that there has been any affirmative finding by the Administrator requiring a change in the established business practices of petitioner, and nothing is known about such affirmative action ever having been taken.

The whole purpose of the Emergency Price Control Act, as amended, was to stabilize prices. General Maximum Price Regulation was designed to fix those prices at March, 1942, levels. Under the construction given by respondent to the General Maximum Price Regulation, as amended, and the applicable statutes in the instant case, the prices at which the petitioner's commodity can be sold were driven down to December, 1941, prices, or lower, irrespective of the fact that petitioner had clearly established higher prices by sales in March, 1942. To have required and to now require petitioner to sell its commodity at the December, 1941, prices, or lower, takes from petitioner its rights under the proviso clause and prohibits the use of its highest offering price during March, 1942.

2.

The Circuit Court of Appeals erred in holding that good

faith is not a defense to respondent's action against petitioner.

It was stipulated by the parties that the respondent did not claim a willful violation by petitioner; and that respondent did not dispute petitioner's contention that what it did in the sale of its gloves it did in the belief that "it had the right to do so *under the applicable regulations.*" (Emphasis supplied.) (Finding No. XIV, R. 147.)

The Court further found as a fact "That defendant (petitioner) in the sale and delivery of its gloves at all times referred to in plaintiff's (respondent's) complaint acted in good faith and in the belief that its sales and deliveries of work gloves were made *in pursuance of applicable regulations of the Office of Price Administration.*" (Emphasis supplied.) (Finding No. 12, R. 181.)

Section 205(d) of the Act (50 USCA App. 925(d); C. 325, Title I, Sec. 108, 58 Stat. 640) provides in part that:

> "No person shall be held liable for damages for penalties in any Federal . . . court, on any grounds for or in respect of any thing done or omitted to be done *in good faith pursuant to* any provision of this Act or *any regulation,* order price schedule, requirement or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration . . . notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid . . . " (Emphasis supplied.)

The trial court has found that petitioner acted *in good faith in pursuance of applicable regulations* of O.P.A. The parties stipulated the good faith of petitioner *under the*

regulations. Petitioner is thus within the protection of Section 205(d) of the Act.

The applicability of the good faith provision to facts such as are in this record, has not been, but should be, decided by this Court. The scope of the good faith provision is of public importance, and the public interest will be promoted by settlement in this Court of the question.

3.

The Circuit Court of Appeals erred in holding that the letter received by petitioner from the Indianapolis Office of Price Administration on March 18, 1943, did not constitute an estoppel.

The letter, among other things, after reciting petitioner's contentions, said:

> "We see no alternative other than to advise you to proceed with shipments on the basis of your March 21, 1942, list prices pending a definite ruling and decision by the Cleveland and Washington offices. It is understood that this does not legalize or validate the prices charged *from May* 11, 1942, the date the General Maximum Price Regulation became effective, *up to the present time.*" (Emphasis supplied) (R. 180).

Prior to the time the letter was written, the Attorney for O.P.A. telephoned the Cleveland office and reported to petitioner's Messrs. Elsey and Clayton that

> "he had presented our views of the matter to the Cleveland office and discussed them with them and they would have a man to go to Washington and take the matter up with the office in Washington, that it was something for them to decide." (R. 97.)

It was not until subsequent to the telephone conversation with the Cleveland office and petitioner believes consultation with the Washington office, that the letter was written to petitioner. It was not until receipt of this letter that petitioner resumed shipments under its March 21, 1942, basic price list. (R. 98.)

The August 28, 1943, letter appears to support the belief that Washington knew of the March 18, 1943, letter. The August letter says in part that "A *further* ruling and determination has now been made by the Washington office." (Emphasis supplied.) (R. 164, para. 6.)

The respondent did not call as witnesses any persons from the Cleveland or Washington offices in respect to the conversations relative to the letter. Nor did respondent call S. A. Robinson, chief price attorney for the Indianapolis office, who conferred with Messrs. Elsey and Clayton and who telephoned the Cleveland office of O.P.A. respecting petitioner's price. There is no showing in the record that respondent did not have it within his power to call such persons. The failure of the respondent to call any witnesses from the Cleveland or Washington offices, having it within his power to do so, is an admission that both approved the letter.

In re Kellog, 113 Fed. 120, 130;

Godwin v. DeMotte, 64 Ind. App. 394, 116 N. E. 17.

Order and certainty, one of the first objectives of good government, cannot be secured if the government itself is not to be depended upon to abide its grants.

United States v. U. S. Gypsum Co., 53 F. Supp. 889, 890.

It certainly was not the intention of Congress in enacting the Emergency Price Control Act to permit the Administrator or his agents, after having once acted upon facts fully before them and exercised their best judgment, to change that judgment to the detriment of a person relying thereon as is the situation in the instant case.

Woodworth v. Kales, 26 F. (2d) 178 (CCA 6 1928).

This too is a question of public importance. As the public deals more and more, as it must, with the swelling throng of federal agencies, there should be set at rest the question of whether the Federal Government, when it becomes an actor in a court of justice, should not be bound by those fixed principles which govern between man and man in like situation.

4.

The Circuit Court of Appeals erred in holding that petitioner was not denied due process of law in not being afforded an adequate opportunity to contest the validity of the regulation as construed by respondent. The Court held, in part, that "Section 203 of the Emergency Price Control Act, 50 U.S.C.A. App. Sec. 923, as amended June 30, 1944, provides for the procedure for filing protests against any regulation, order or price schedule *at any time* after issuance or effective date thereof and for disposition of such protests by the Administrator." (R. 200.)

This statement is predicated on the amendment of Section 923 of Title 50 U.S.C.A. App. by the Stabilization Extension Act of 1944, effective June 30, 1944. Prior to the amendment on June 30, 1944, the statute limited the time within which a protest might be filed to a period of 60 days

after the issuance of any regulation or order or within 60 days after the effective date of any price schedule.

Neither petitioner nor respondent knew precisely what respondent's construction of the General Maximum Price Regulation involved here was until August 28, 1943. (Stip. Ex. C, R. 163.) The General Maximum Price Regulation was effective on May 11, 1942. Thus, under the statute as it existed at that time, petitioner was precluded from raising the question of the validity of the regulation after July 10, 1942, which was the expiration of the 60-day period. The complaint seeks to recover for sales at allegedly over-ceiling prices made between October 6, 1942, and October 6, 1943. Since the 60-day limitation was not removed from Section 923 of the statute until June 30, 1944, petitioner's opportunity of protesting the regulation was not enlarged beyond the 60-day period until after the sales in controversy here had been made. To have protested the regulation after the removal in 1944 of the 60-day limitation would have been of doubtful aid to petitioner in respect of sales made between October 6, 1942, and October 6, 1943.

Furthermore, petitioner was not notified by respondent until receipt of the letter dated August 28, 1943 (Stip. Ex. C, R. 163-170) of the construction respondent placed on the regulation as to maximum prices to be charged for certain models of its gloves. Nor did petitioner know until receipt of the August 28, 1943, letter that respondent's construction was that certain style numbers of its gloves were not to be considered the same commodity in applying the pricing provisions of the regulation.

Petitioner did receive a letter dated March 2, 1943, signed by the price attorney of the Indianapolis office of respondent claiming that petitioner's prices were in ex-

cess of maximum prices (Stip. VI, R. 146). But this letter was superseded by a letter dated March 18, 1943, from the same office of respondent, which instructed petitioner to proceed to deliver its commodity on the basis of its March 21, 1943, prices. (Finding No. 8, R. 179, 180.)

Within less than 60 days of the date of the August 28, 1943, letter, giving petitioner respondent's construction of the regulation as applied to petitioner, and on October 6, 1943, this suit was commenced by respondent. In other words, from the date of the letter to the date of the commencement of this suit by respondent only 40 days elapsed.

On August 28, 1943, Section 203 of the Act (50 USCA App. 923(a)) allowed 60 days within which any person subject to any regulation, order, price, schedule, requirement or agreement could file a protest. Yet, despite this 60 provision, respondent commenced the instant suit within 40 days after the date of the letter.

Petitioner, by the haste of respondent, also has been denied due process of law, and the Circuit Court of Appeals has erred in refusing to grant petitioner relief. A denial of due process will be corrected by this Court (*Yakus v. United States*, 321 U. S. 414, 88 L. Ed. 834).

WHEREFORE, petitioner prays the writ be granted.

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Dated November 20, 1945.